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IN THE

Supreme Court of the United States

October Term, 1957

No. 554

CHAIN INSTITUTE, INC., AMERICAN CHAIN & CABLE COMPANY, INC., THE McKAY COMPANY, HODELL CHAIN COMPANY, ST. PIERRE CHAIN CORPORATION, S. G. TAYLOR CHAIN COMPANY, COLUMBUS McKINNON CHAIN CORPORATION, CAMPBELL CHAIN COMPANY, NIXDORFF-KREIN MANUFACTURING COMPANY, PEERLESS CHAIN COMPANY, THE JOHN M. RUSSELL MANUFACTURING COMPANY, INC., TURNER & SEYMOUR MANUFACTURING COMPANY, WESTERN CHAIN PRODUCTS COMPANY, WILLIAM D. KIRKPATRICK, and GEORGE J. CAMPBELL, JR.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Chain Institute, Inc.; American Chain & Cable Company, Inc.; The McKay Company; Hodell Chain Company; St. Pierre Chain Corporation; S. G. Taylor Chain Company; Columbus McKinnon Chain Corporation; Campbell Chain Company; Nixdorff-Krein Manufacturing Company; Peerless Chain Company; The John M. Russell

Manufacturing Company, Inc.; Turner & Seymour Manufacturing Company; Western Chain Products Company; William D. Kirkpatrick, and George J. Campbell, Jr., respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit entered on July 19, 1957 which affirmed and ordered the enforcement of an order to cease and desist issued by the Federal Trade Commission.

Opinions Below

The opinion of the Court of Appeals is reported in 246 F. 2d 231, and is printed in the Appendix, *infra*, pp. 29-44. The majority of the Federal Trade Commission wrote no opinion in connection with the issuance of the cease and desist order. Their findings as to the facts, conclusion and order, and the dissenting opinion of Commissioner Mason, are reported in 49 F. T. C. Dec. 1041, 1069-1110, and are in the record as printed for the Court below at pp. 592-662.[1]

Jurisdictional Statement

The judgment of the Court of Appeals (Appendix, *infra*, pp. 45-46) was entered on July 19, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

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[1] Nine copies of the record as printed for the Court below have been filed pursuant to paragraph 4 of Rule 21. References thereto will hereinafter be made by the letter "R." followed by the page number or numbers.

Questions Presented

1. Does this Court's decision in *Federal Trade Commission* v. *National Lead Company*[2] justify the inclusion in the Commission's instant order of a paragraph having the practical effect of (i) prohibiting the individual use of all types of delivered pricing, (ii) leaving no practical alternative but straight f.o.b. factory pricing, (iii) destroying the right of each petitioner as a private business concern to exercise its own independent business judgment as to whether it will use a point of origin or a point of destination pricing method, (iv) depriving each petitioner of the right to compete regularly in distant markets, and (v) seriously injuring petitioners in their businesses and reducing competition to the injury of the public?

2. Was the denial by the Commission of an opportunity to be heard on the form, substance and effects of the third ordering paragraph of the order a denial of due process of law?

3. Does mere "conscious parallelism" in the continued use of lawfully pre-existing delivered pricing methods during the period of an alleged price-fixing conspiracy justify an inference that such continued use was by agreement where such methods were non-collusive in their genesis and use long prior to such alleged price-fixing?

Statute Involved

Section 5 of the Federal Trade Commission Act, as amended,[3] provides in part as follows:

> "(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * *

[2] 352 U. S. 419 (1957).

[3] 38 Stat. 719 (1914), as amended, 15 U. S. C. A. § 45.

"(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * *

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * * the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings * * * a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, * * *. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28."[4]

Statement of the Case

The Commission found that petitioners had engaged in an alleged price-fixing conspiracy.[5] The cease and desist order contained provisions against price-fixing.[6] In addition it contained two provisions relating to the three

[4] Certiorari is now governed by 28 U. S. C. § 1254(1).

[5] R. 592-653.

[6] R. 653-657.

delivered pricing methods which had existed traditionally in the industry:

(1) Subparagraph (6) of the first ordering paragraph required petitioners to cease *agreeing* to use the delivered pricing methods.[7]

(2) The third ordering paragraph required each manufacturing petitioner to cease the *individual* use of all three delivered pricing methods for the purpose or with the effect of systematically matching other sellers' delivered prices.[8]

The three delivered pricing methods, each applicable to a particular type of chain, were as follows:

(1) *"Universal Delivered Price" Method.* This method was used only on tire chains. Each manufacturer's price was a delivered price applicable to all destinations throughout the United States.[9]

(2) *Freight Equalization.* This method was used only on weldless chain. Each manufacturer sold at his f. o. b. factory price and the buyer paid the freight to destination. However, if such freight was greater than it would have been if the buyer had bought from a competing factory, the buyer was given an allowance equal to the difference.[10]

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[7] R. 655.

[8] R. 656-657.

[9] R. 608-609, 704, 745-746. Each manufacturer actually quoted a price f. o. b. his factory with full freight allowed to destination, making his f. o. b. factory price, in effect, his delivered price everywhere. The Commission calls this a "zone system".

[10] R. 606-607, 703, 735-738, 779, 878-879, 934-935.

(3) *Pittsburgh Plus.* This method was used only on welded chain. Each manufacturer sold at a price f.o.b. his factory plus the equivalent of the freight from Pittsburgh, Penna. to destination.[11]

The reason for three different delivered pricing methods is that originally there were three different chain industries each with its different group of manufacturers.

Welded chain was sold on the Pittsburgh Plus basis beginning in about 1900 because the raw material, steel, was then sold that way.[12] The companies then making welded chain did not make the other types.[13] As other companies entered the business they adopted the method because it was one that welded chain buyers were used to.[14] In 1945, in view of certain decisions of this Court,[15] one welded chain manufacturer abandoned Pittsburgh Plus and in 1947 another did likewise.[16]

The history and development of the Freight Equalization method of selling weldless chain are graphically depicted in Maps A through G, facing this page.[17]

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[11] R. 604-605, 702, 728-729.

[12] R. 702-703.

[13] R. 779.

[14] R. 702-703, 734, 880-881, 931.

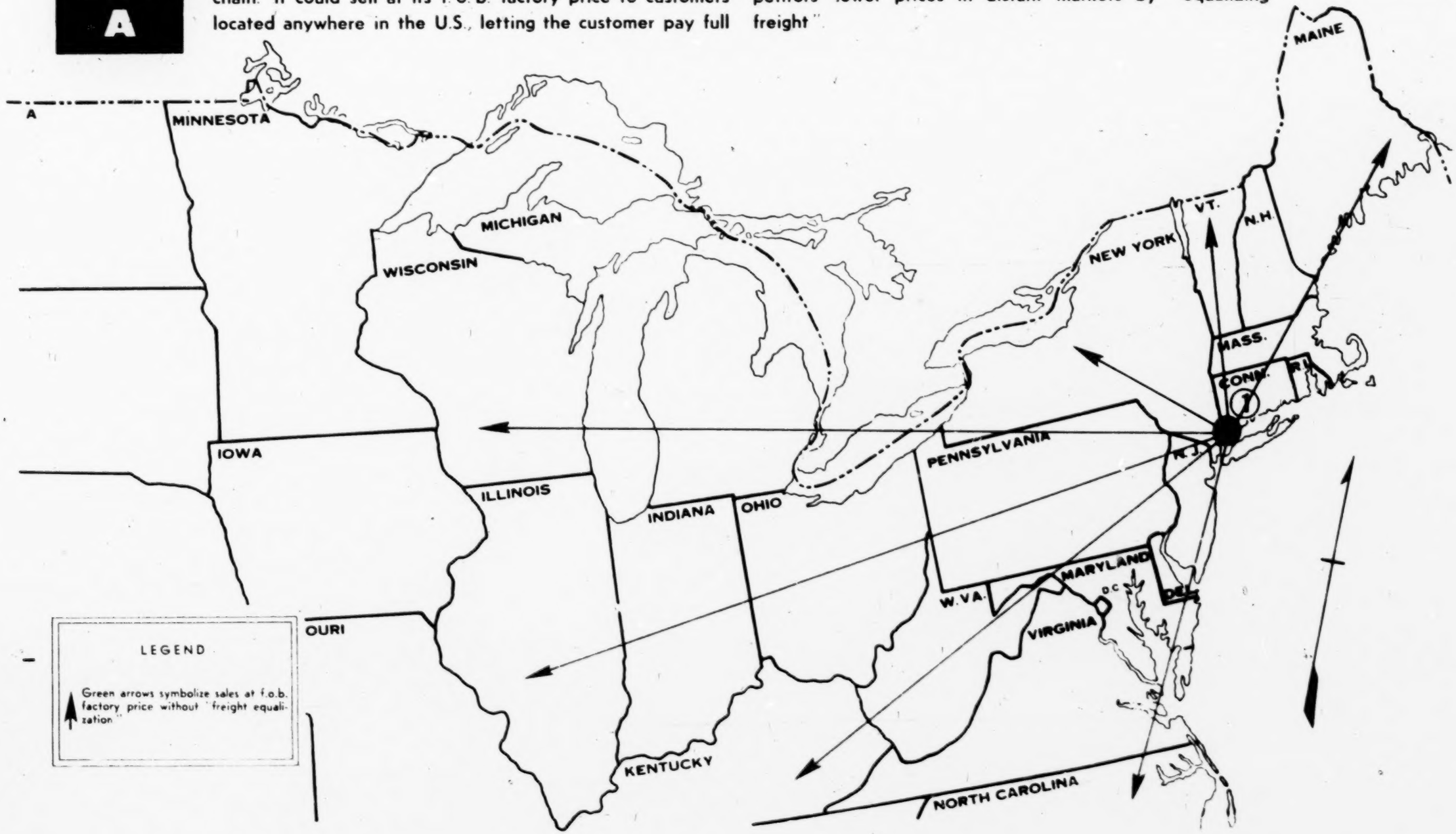
[15] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945); *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945).

[16] R. 1013-1014, 1022.

[17] These maps are not exhibits in the case but were prepared to illustrate graphically the genesis and evolution of the Freight Equalization method as shown by the evidence (R. 735-736, 813-816, 819-820, 911, 926). The lines or "walls" shown on the maps, along which the freight from a plant on one side will be equal to that from a plant on the other, are not intended to be accurately located or shaped, but are drawn roughly midway between the plants concerned. This is in accordance with testimony on the subject (R. 864). Accurately drawn lines would, in view of the peculiarities of railroad tariffs, not necessarily lie exactly midway between the plants nor necessarily be straight lines.

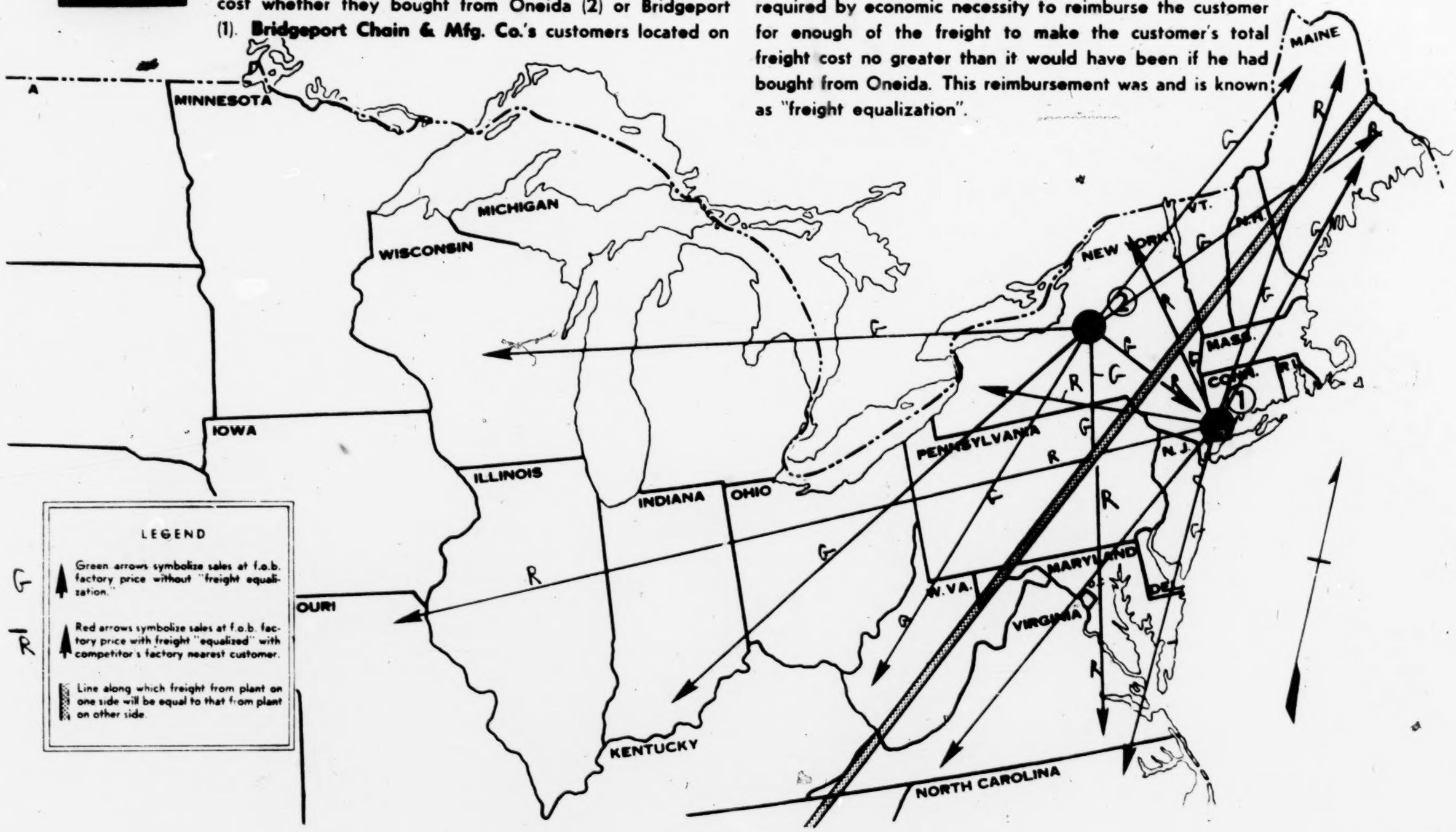
MAP A

Prior to 1908, **Bridgeport Chain & Mfg. Co.** of Bridgeport, Conn. (1) was the only producer of ordinary weldless chain. It could sell at its f. o. b. factory price to customers located anywhere in the U.S., letting the customer pay full freight from factory to destination. Having no competitors at all, it was under no economic compulsion to meet competitors' lower prices in distant markets by "equalizing freight".



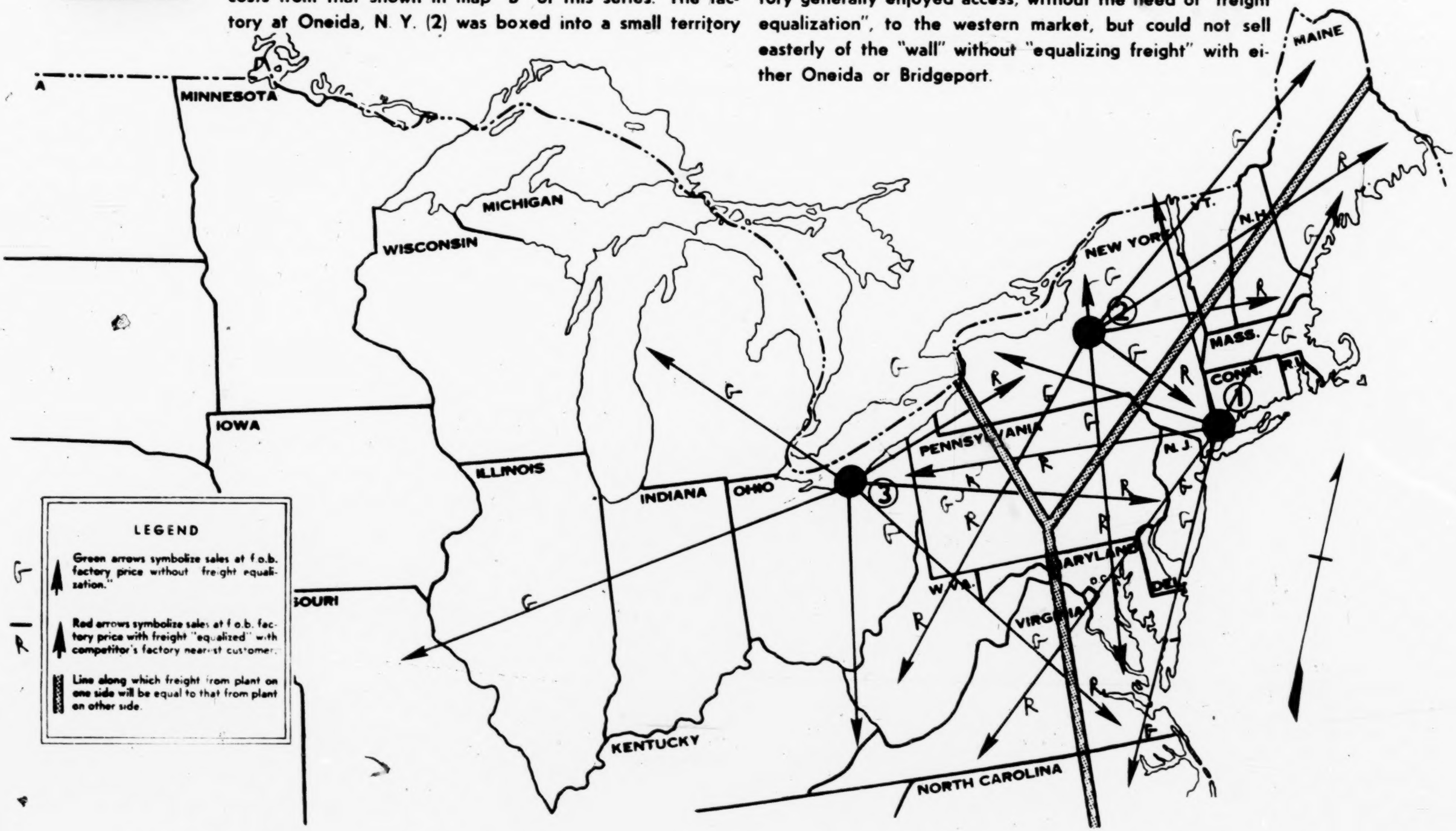
MAP B

By 1908, a second producer of ordinary weldless chain, **Oneida Community**, was in business at Oneida, N. Y. (2). The map below shows as a symbolic "wall" the approximate line along which customers would pay the same freight cost whether they bought from Oneida (2) or Bridgeport (1). **Bridgeport Chain & Mfg. Co.**'s customers located on Oneida's side of this "wall" would no longer pay the higher freight charge involved in buying from Bridgeport when they could buy from Oneida at a lower freight cost. To retain these customers, **Bridgeport Chain & Mfg. Co.** was required by economic necessity to reimburse the customer for enough of the freight to make the customer's total freight cost no greater than it would have been if he had bought from Oneida. This reimbursement was and is known as "freight equalization".



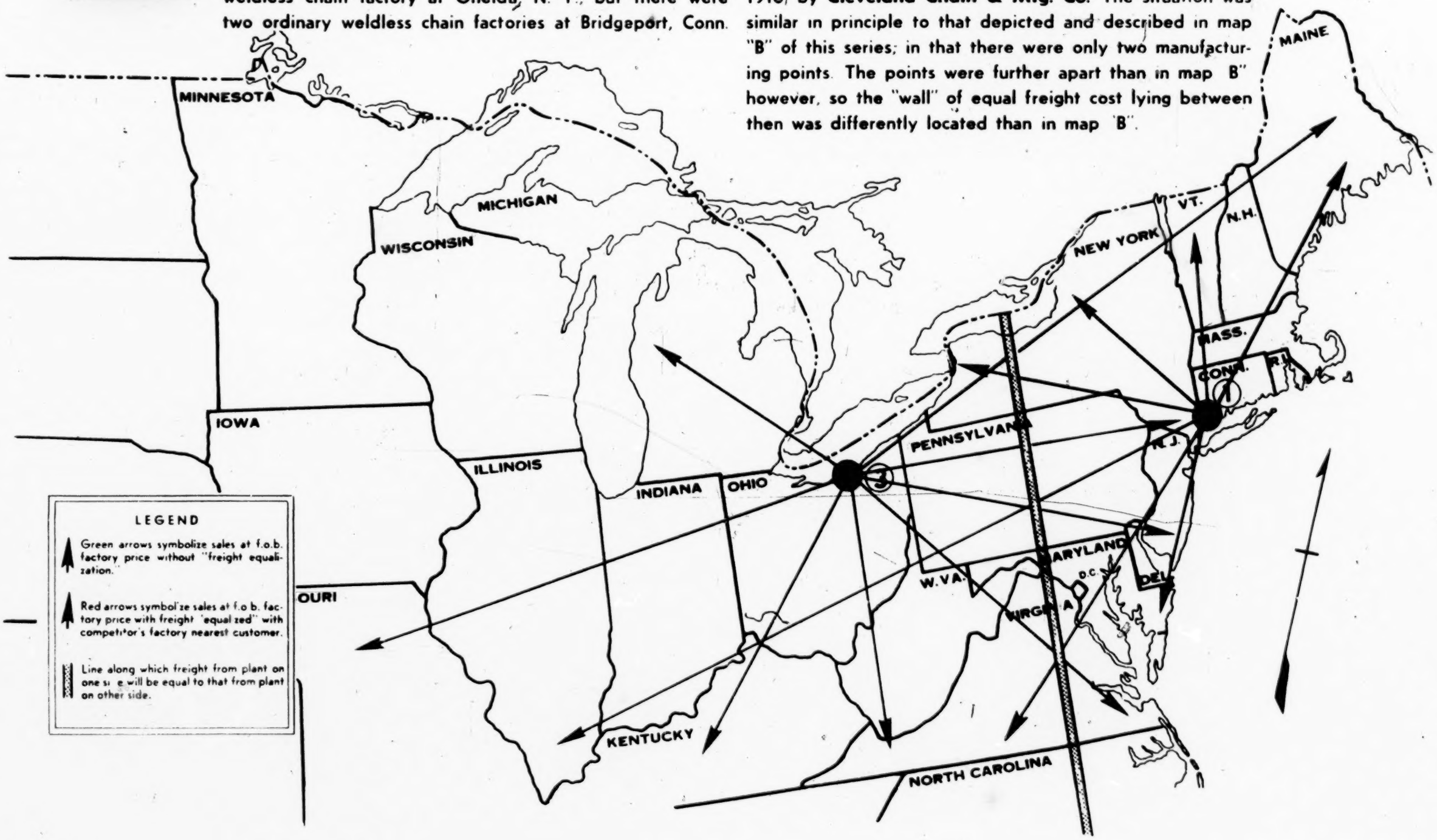
MAP C

About 1909 or 1910, a third producer of ordinary weldless chain, **Cleveland Galvanizing Co.** (predecessor of present Hodell Chain Co.), was in business at Cleveland, Ohio (3). This changed the pattern of the "wall" of equal freight costs from that shown in map "B" of this series. The factory at Oneida, N. Y. (2) was boxed into a small territory beyond which it could make no sales without "equalizing freight" with either Bridgeport (1) or Cleveland (3). The area in which the Bridgeport factory could sell without "equalizing freight" was narrowed. The new Cleveland factory generally enjoyed access, without the need of "freight equalization", to the western market, but could not sell easterly of the "wall" without "equalizing freight" with either Oneida or Bridgeport.



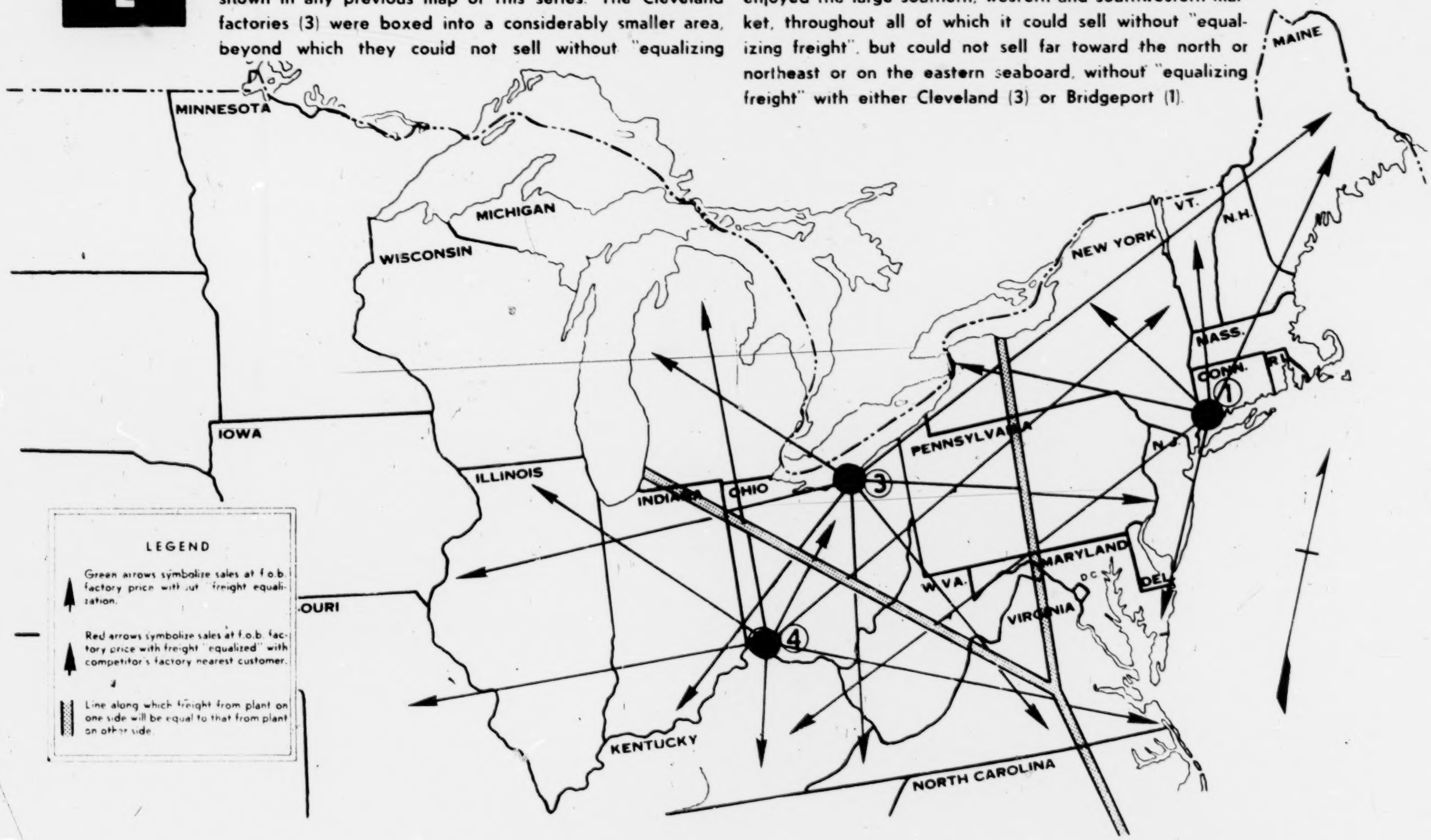
MAP D

In 1912 **Weed Chain Tire Grip Co.** (predecessor of present American Chain & Cable Co.) bought out the weldless chain business of **Oneida Community** and moved the machinery to Bridgeport, Conn. (1). There was no longer any weldless chain factory at Oneida, N. Y., but there were two ordinary weldless chain factories at Bridgeport, Conn. (1), one owned by **Bridgeport Chain & Mfg. Co.** and the other by **Weed Chain Tire Grip Co.** There were also two such factories in Cleveland, Ohio (3), one owned by **Cleveland Galvanizing Co.** and the other (opened in 1910) by **Cleveland Chain & Mfg. Co.** The situation was similar in principle to that depicted and described in map "B" of this series; in that there were only two manufacturing points. The points were further apart than in map "B" however, so the "wall" of equal freight cost lying between then was differently located than in map "B".



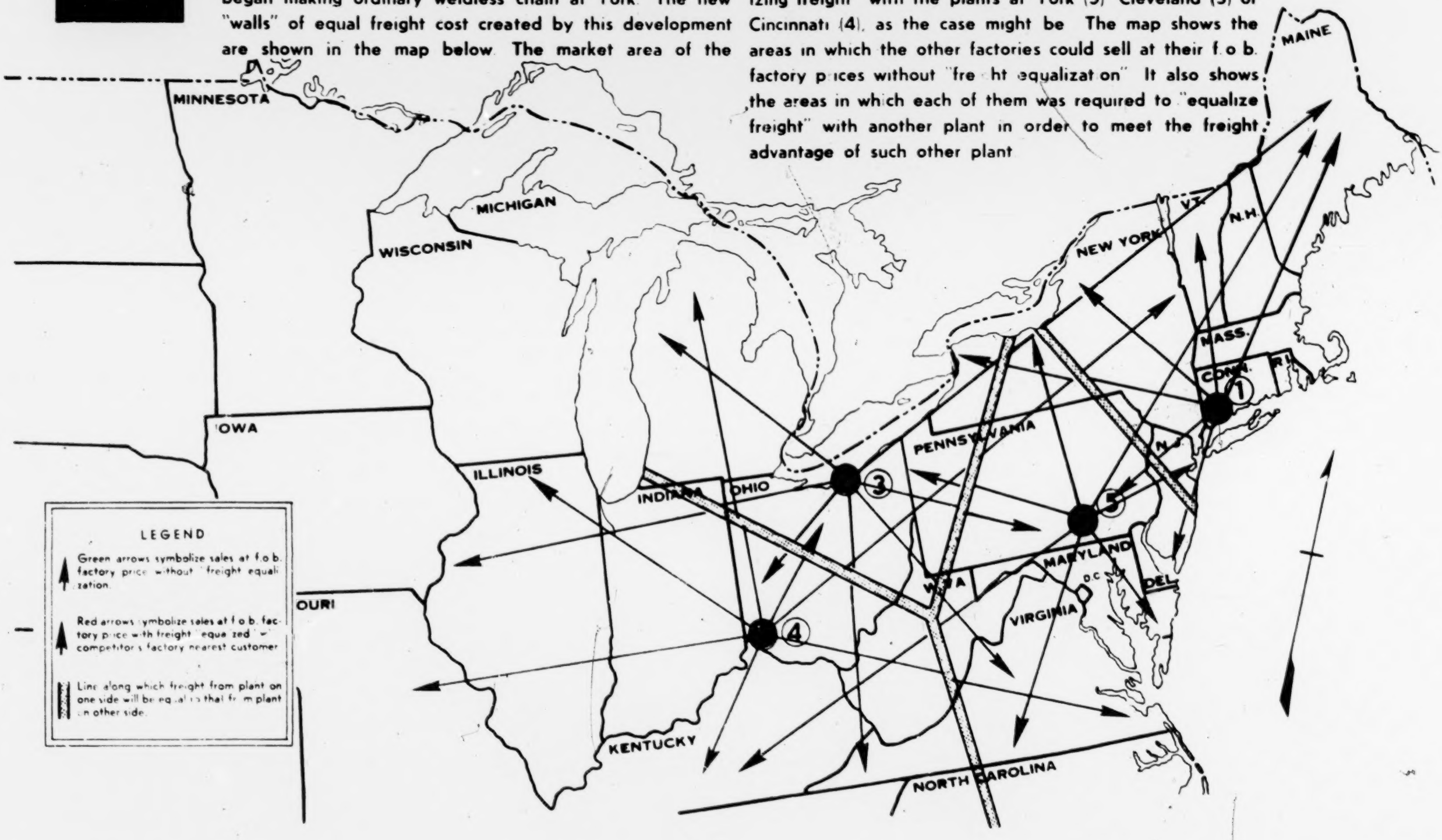
MAP E

In the early 1920's, **Cincinnati Pump Co.** began making ordinary weldless chain at Cincinnati, Ohio (4). This altered the pattern of the "wall" of equal freight costs from that shown in any previous map of this series. The Cleveland factories (3) were boxed into a considerably smaller area, beyond which they could not sell without "equalizing freight" either with Cincinnati (4) or Bridgeport (1). The Bridgeport factories (1) were in approximately the same situation as in map "D". The new Cincinnati factory (4) enjoyed the large southern, western and southwestern market, throughout all of which it could sell without "equalizing freight", but could not sell far toward the north or northeast or on the eastern seaboard, without "equalizing freight" with either Cleveland (3) or Bridgeport (1).



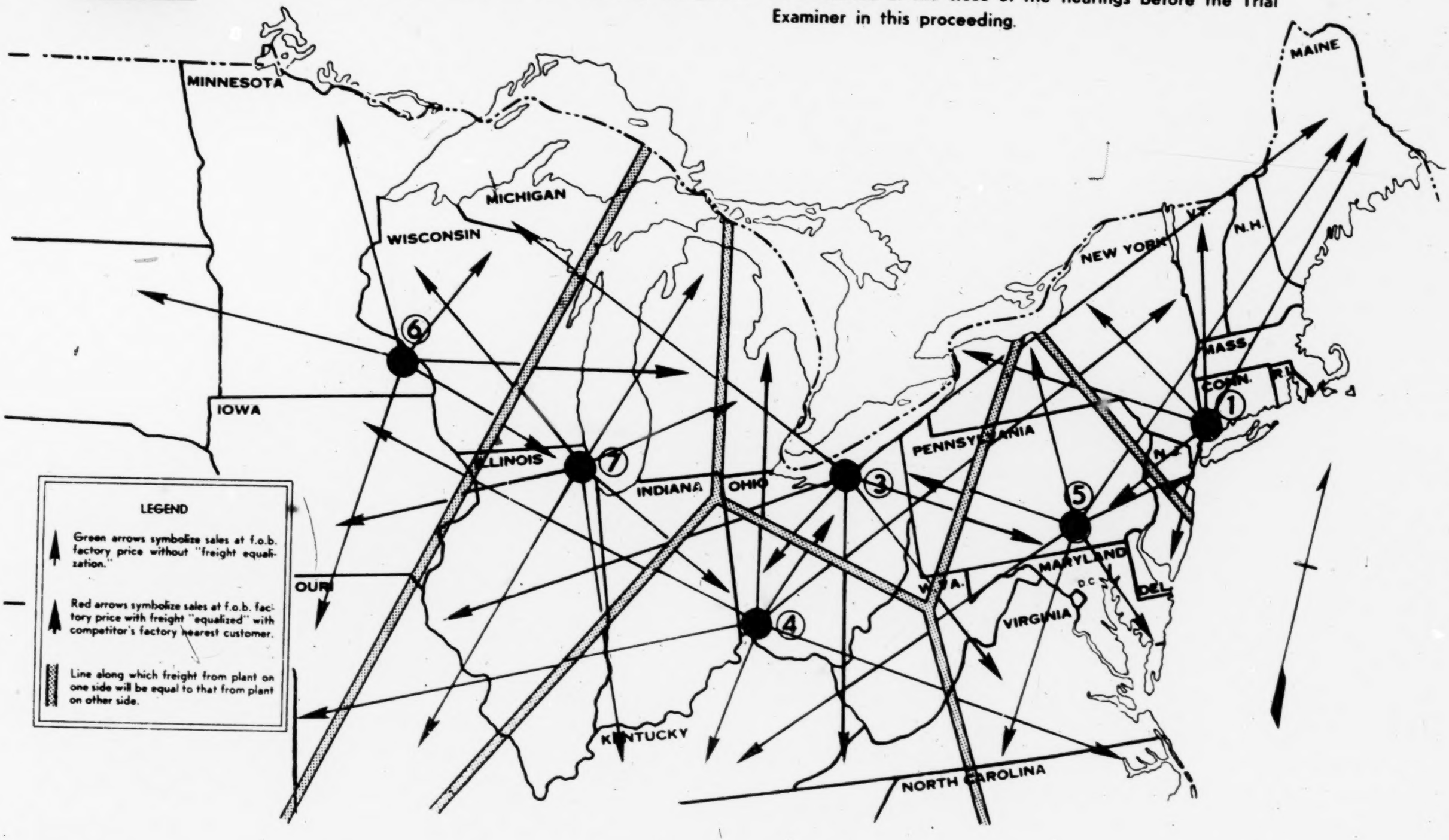
MAP F

About 1927, **American Chain & Cable Co.** moved its ordinary weldless chain factory from Bridgeport, Conn (1) to York, Penna. (5) About the same time **The McKay Co.** began making ordinary weldless chain at York. The new "walls" of equal freight cost created by this development are shown in the map below. The market area of the **Bridgeport Chain & Mfg. Co.** (1) was reduced to Eastern New York, Northern New Jersey and New England. It could not sell west or south of this area without "equalizing freight" with the plants at York (5) Cleveland (3) or Cincinnati (4), as the case might be. The map shows the areas in which the other factories could sell at their f.o.b. factory prices without "freight equalization". It also shows the areas in which each of them was required to "equalize freight" with another plant in order to meet the freight advantage of such other plant.



MAP G

In 1941, **Peerless Chain Co.** began making ordinary weldless chain at Winona, Minn. (6). In 1945, **Western Chain Products Co.** began making ordinary weldless chain at Chicago, Ill. (7). This map shows the resulting changes in the "walls" of equal freight costs, and the extent to which "freight equalization" would be necessary under normal economic conditions in the ordinary weldless chain industry as it existed at the close of the hearings before the Trial Examiner in this proceeding.



The Universal Delivered Price method of selling tire chains was adopted by Weed Chain Tire Grip Co.[18] in about 1905 when it first introduced tire chains as a patented product. It chose this method because it was the best way to obtain nationwide sales of a new consumer product. Moreover, it was the way in which most automobile accessory products were sold and auto accessory jobbers insisted on it.[19] When Weed's patents expired in 1921 other tire chain manufacturers entered the field and adopted the method because they could think of no better one and because their jobber customers insisted on it.[20] One of the new manufacturers tried to sell on an f.o.b. factory basis but his customers deducted their freight costs in paying his invoices, thus, in effect, putting him on the Universal Delivered Price basis.[21]

There was direct, categorical and uncontradicted testimony that none of the three delivered pricing methods was the subject of agreement either in its adoption or continued use by any manufacturer.[22] There was no contrary evidence, nor did the Commission make any evidentiary finding to the contrary. The Commission's sole evidentiary findings on the question of alleged conspiracy to use the delivered pricing methods, indeed on the entire subject of delivered pricing were limited to:

(i) a description of each method;[23]

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[18] Weed Chain Tire Grip Co. was the predecessor of petitioner American Chain & Cable Company, Inc.

[19] R. 824-829, 884-887, 889, 1066-1068, 1071-1072.

[20] R. 746, 754, 828-829, 898-899, 903-904, 1032-1033, 1058-1059.

[21] R. 897, 904.

[22] R. 729-730, 733-734, 740-741, 744, 748, 779, 793-794, 820, 826-829, 878-881, 886-887, 897-899, 903-904, 931, 942, 945, 982-983, 992, 1017, 1022, 1032-1033, 1045-1046, 1050-1051, 1054, 1056, 1058-1059, 1066-1073, 1111-1112.

[23] Findings 3, 4 and 5, R. 604-609.

(ii) a description of the Chain Institute's freight rate book which was used (and usable) only in pricing welded chain;[24] and

(iii) a finding of "conscious parallelism" in the use of each of the methods.[25]

Following such evidentiary findings, the Commission drew the inference that there was

> "* * * *necessarily* an understanding and agreement between all of the respondents that each * * * would continue to use the particular [delivered pricing] method or system applicable to the type or types of chain each sold. Otherwise the various cooperative and collective actions entered into and engaged in would not have brought about the results desired."[26]

Based presumably on the foregoing inference, the Commission included subparagraph (6) in the conspiracy portion of its order. The effect of that subparagraph was to prohibit petitioners from *agreeing* or *conspiring* to:

> "(6) Quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with the single basing point delivered-price system, the freight equalization delivered-price system, or the zone delivered-price system; or quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with any other plan or system which results in identical price quotations or prices * * * by any two or more sellers * * * using such plan or system or which prevents

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[24] Finding 6 (e), R. 637-638. This book was required by the N. R. A. Code and was continued thereafter as a convenience for those manufacturers of welded chain who cared to use it but not all did so (R. 795-796, 932, 941, 1052-1053, 1112, 1117).

[25] Finding 9, R. 649-651 (see first sentence of paragraph which commences on R. 650).

[26] *Ibid.* (Italics supplied).

purchasers from finding any advantage in price in dealing with one or more as against another seller." [27]

In addition, the Commission inserted in its order a third ordering paragraph, *applicable regardless of agreement or the lack of it*, and reading as follows:

> "IT IS FURTHER ORDERED that each of the corporate respondents [naming them] * * * do forthwith cease and desist from quoting or selling chain or chain products at prices calculated or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system, for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." [28]

Petitioners here seek review of the Court of Appeals' affirmance of the above-quoted two paragraphs of the Commission's order and review of the affirmance of the Commission's conclusion that there was "*necessarily* an understanding and agreement" to continue the use of the delivered pricing methods.[29]

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[27] R. 655.

[28] R. 656-657.

[29] (Italics supplied). Petitioner Chain Institute, Inc. is not affected by the third ordering paragraph and joins in this petition only with respect to subparagraph (6) of the first ordering paragraph and the aforementioned inference of agreement on which subparagraph (6) is based. Petitioners originally sought review in the Court of Appeals of all of the Commission's findings of conspiracy and its entire cease and desist order. They abandoned their attack on the conspiracy portions of the findings and order (except those relating to the delivered pricing methods) not because they conceded the correctness of such findings but to save time and expense and simplify the issues. Not all the parties who were respondents before the

Reasons for Granting the Writ

I.

The first question is whether this Court's *National Lead* decision [30] justifies the inclusion in the instant order of the above-quoted third ordering paragraph under the circumstances of the instant case.

In sustaining that paragraph the Court of Appeals relied on the *Lead* decision. If we understand that decision, however, it merely affirmed the Commission's statutory authority, *under the circumstances of the Lead case*, to include in its order a conditional prohibition of the individual use of one delivered pricing method, a zone system.

Lead Case Circumstances Entirely Different from Instant Case

The circumstances of the *Lead* case are totally different from the corresponding circumstances of the instant case. The *Lead* zone system was actually *created* by agreement to replace a pre-existing and apparently lawful delivered pricing method.[31] The Commission emphasized this fact

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Commission are petitioners here. Frank A. Bond died and the order was modified to strike his name from it (R. 664). Pyrene Manufacturing Company sold its chain business while the case was before the Commission and elected not to participate further (R. 233-234). The Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Mfg. Company and Woodhouse Chain Works sold their chain businesses to Republic Steel Corporation while the case was pending on review in the Court of Appeals and, on their motion, the Court of Appeals on September 23, 1955 entered an order dismissing the petition for review as to them (Appendix, *infra*, pp. 47-54). Dennis A. Merriman died in 1957.

[30] *Supra*, note 2.

[31] *Ibid.*, at pp. 421-423.

in justification of the paragraph forbidding further individual use of the zone system.[32] In the instant case there is no finding nor evidence that any of the delivered pricing methods had its origin in conspiracy. On the contrary, the uncontradicted evidence (ignored by the Commission in its findings) was that the origin and history of each method was a normal economic one.[33]

This Court characterized the *Lead* zone system as "highly artificial", saying that the zone boundaries led to "bizarre results" because purchasers near factories sometimes paid more than those at a distance.[34] The Court of Appeals referred to the *Lead* zone system as "so arbitrary and artificial as to negative an inference of innocent parallel behavior."[35] In the instant case neither the Universal Delivered Price method nor the Freight Equalization method could be characterized as "artificial" or "bizarre". Neither of these methods could nor did result in customers near factories paying more than those at a distance.[36] Neither of them could be said to "negative

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[32] 49 F. T. C. 791 at p. 884.

[33] Statement of the Case, *supra*, pp. 6-7.

[34] *Supra*, note 2 at p. 422.

[35] *National Lead Co.* v. *Federal Trade Commission* (CCA-7, 1955), 227 F. 2d 825 at p. 834.

[36] The Pittsburgh Plus method, used only on welded chain, did occasionally have this result. This method is generally regarded as outmoded. However, it was a common method in the first several decades of this century and its genesis was equally as innocent as those of the other two types. By dismissing Count II of the amended complaint, the Commission expressly exonerated the Pittsburgh Plus method in *this case* from the Robinson-Patman Act defects of the single basing point system condemned by this Court under that statute in the *Corn Products* and *Staley* cases, *supra*, note 15. Although the ten year old record in this case does not show it, counsel are informed that the Pittsburgh Plus method is no longer used by any of the petitioners. The record does show that two of the petitioners had already abandoned it by 1947 (*Supra*, note 16).

an inference of innocent parallel behavior". Indeed, the Commission itself has said of the Universal Delivered Price method that under circumstances such as those pertaining to tire chains (a relatively low average freight cost),[37] it "may be a method of quoting more convenient to buyer and seller and less costly than a point of origin price", and that it "would not be inconsistent with price competition and would not be indicative of any lack of such competition."[38]

Since the *Lead* zone system was created as part of the price-fixing conspiracy and never enjoyed a period of non-collusive existence (it apparently was too artificial to exist independently), it was necessary to ban it so as to insure the discontinuance of the conspiracy. In the instant case, however, the delivered-pricing methods antedated the alleged price-fixing conspiracy by some 25 years and demonstrated their ability to exist without it. There is no warrant for assuming that the alleged price-fixing conspiracy cannot be eliminated unless they too are eliminated.

Lead Order Prohibits Only Zone System; Instant Order Stops All Delivered Pricing

The most important distinction between the *Lead* order and the instant third ordering paragraph, however, is that while the former prohibits *only* the zone system, the latter indiscriminately prohibits *all three methods* of delivered pricing used in the chain industry. Its prohibitions encompass all the known methods of delivered pricing with the possible exception of selling f. o. b. a nationwide fleet

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[37] A study of invoices in the record showed that the average amount of freight allowed by tire chain manufacturers in selling on the Universal Delivered Price basis was only 5½% of the delivered price paid by the customer (R. 1104-1106, Res. Ex. 54).

[38] "Price Bases Inquiry; the Basing Point Formula and Cement Prices," published by the Federal Trade Commission in 1932, and printed by the U. S. Government Printing Office, p. 13.

of trucks or f. o. b. a nationwide network of warehouses—two very expensive methods which are not generally available to the smaller members of the industry.[39]

It is true that the third ordering paragraph applies only when one of the delivered pricing methods is used for the purpose or with the effect of systematically matching the delivered prices of a competitor. *But this is the normal and lawful purpose and effect of any delivered pricing method*—to enable a seller to meet (match) the prices of competing sellers whose plants are located closer to the customer than his.[40] If, therefore, a petitioner lowers his price in a distant market to meet that of a local seller and does this with any regularity (i.e., other than sporadically or occasionally), he risks the charge that he acted "systematically" and thereby violated the order.

That this is the Commission's position is demonstrated in its supplemental memorandum to this Court in the *Lead* case in which the Commission stated that a lead pigments manufacturer might sell on a zone price basis provided his prices were different from his competitors'.[41] Apparently recognizing the predicament this would put the seller in where his prices were *higher* than his competitors',[42] the Commission stated that the seller might meet (match) a competitor's lower price "*in some instances*" without violating the order.[43] The number of instances comprising

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[39] "Study of Federal Trade Commission Pricing Policies," Senate Document No. 27, 81st Cong., 1st Sess. (1949) describes all known delivered pricing methods (pp. 2-5) and comments on the lack of availability of f. o. b. truck and warehouse pricing to small sellers (p. 20).

[40] Chain of a given type, size and specifications is "homogeneous" in the sense that buyers will not pay more for one manufacturer's product than for another's (R. 748, 780, 1055-1056, 1097).

[41] Appendix, *infra*, pp. 58-59.

[42] *Ibid.*, p. 59.

[43] *Ibid.*

"some instances" was either so uncertain or so small, however, that the Commission concluded that "It seems entirely probable that respondents would use a different pricing method rather than risk violation of the order through the use of zone delivered pricing." [44]

But in the instant case there are no different pricing methods available, except: (i) straight f. o. b. factory pricing, or (ii) the very expensive f. o. b. truck or warehouse pricing. To the smaller manufacturers unable to afford alternative (ii), straight f. o. b. mill pricing would seem the only haven against prosecution.

Uncontradicted evidence (ignored in the Commission's findings) showed that enforced f. o. b. mill pricing would have disastrous economic effects in the chain industry. It would confine each manufacturer to an area closer freightwise to his plant than to the plants of his surrounding competitors, and with the exception of two manufacturers, there would not be enough business in that circumscribed area to keep the plant going.[45] When the testimony was taken (some 10 years ago) there were thirteen chain manufacturers *not* subject to the order.[46] In the meantime five of the companies which *are* subject to the order (an affiliated group which collectively is the second largest concern in the industry) have sold their chain businesses to Republic Steel Corporation which is not subject to this order because it bought only their physical assets and did not assume their liabilities.[47] (The five concerns are still in existence making products other than chain.) Republic Steel and the other concerns outside the order are all free to use any delivered pricing method they wish for the purpose of meeting or

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[44] *Ibid.*

[45] R. 760-762, 835-836, 863-865, 870, 899-900, 915-916, 945-948, 983-988, 1035, 1040-1041.

[46] R. 607, 852-853, 967-968, 1092.

[47] *Supra*, note 29 (next to last sentence).

matching, *as systematically as they wish*, the prices of petitioners in the latters' home markets. Petitioners may not, however (unless they have the resources to establish chains of warehouses as f. o. b. points), recoup this lost business by selling in the home markets of the invaders, except occasionally or sporadically, if they wish to avoid prosecution for violating the order. Surely, the objective of restoring competition in the chain industry cannot be accomplished by hobbling petitioners (particularly the smaller companies that cannot afford extensive warehouses) so they cannot compete.

Special Economic Reasons for Use of Universal Delivered Price Method in Selling Tire Chains

In the case of tire chains the best markets shift about from year to year depending on the amount of snowfall in a given area.[48] The small St. Pierre Chain Company which has the only tire chain plant in New England (at Worcester, Mass.) was one of the two concerns that the evidence showed could obtain enough business in its home markets under f. o. b. mill pricing to keep its plant running.[49] But this presupposed that New England would always have sufficient snow which the evidence showed not to be true.[50] It also presupposed that all of St. Pierre's competitors would also be forced onto f. o. b. mill pricing which is not true of Republic Steel or the other outside chain manufacturers.

Shifting weather conditions are one of the reasons why it is essential for tire chains to be sold on the Universal Delivered Price basis. This method enables them to be sold freely in any market in the United States. The public interest is promoted by this method of selling because in severe blizzards no one manufacturer could supply the emergency demands of an area.[51]

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[48] R. 757-759, 834-835, 871, 900, 950, 951-952.
[49] R. 899-900.
[50] R. 900.
[51] R. 757-758, 834-835.

Republic Steel and other manufacturers outside the order presumably will continue to use the Universal Delivered Price method of selling their tire chains. But despite the conditional language of the third ordering paragraph, anyone subject to the order faces grave risks if he tries to use the method at all. If, in using it, he puts his prices higher than those of other manufacturers he will make no sales. If he meets (matches) the prices of other manufacturers, he will face prosecution under the order. Even if he sets his prices below those of others, the manufacturers not under the order will meet his lower prices and, in the fluctuations of the market, it will ultimately become difficult, if not impossible, for him to prove who met (or matched) whom; so again he will risk prosecution under the order. Since the jobbers who handle tire chains not only prefer but *insist* on the Universal Delivered Price method (it being the way they buy their other auto accessory products),[52] petitioners will be foreclosed for all practical purposes from the only method of selling by which they can get their tire chains on the market. Yet this method, far from being iniquitous, is used on chewing gum, cigarettes and many other products, as the Court of Appeals noted,[53] and is a traditional American method of selling.

Sec. 2(b) of Robinson-Patman Act Will Not Ameliorate Bad Effects of Order

This Court stated in the *Lead* case that the provisions of Section 2 (b) of the Clayton (Robinson-Patman) Act,[54] permitting the meeting of lower competitive prices, are to be read into every Commission order.[55] However, it also said that this will not enable a seller to plead this section in defense of an entire pricing "system"[56] and that the

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[52] *Supra*, notes 19 and 20.

[53] 246 F. 2d 231, at p. 236; Appendix, *infra*, p. 36.

[54] 49 Stat. 1526 (1936), 15 U. S. C. A. § 13 (b).

[55] *Supra*, note 2 at p. 426.

[56] *Ibid.*, at pp. 426 and 431.

section is designed to protect competitors in "individual transactions".[57] The Commission's supplemental memorandum in the *Lead* case[58] has made clear, as we have already shown, that it will regard as "systematic" any but the most occasional and sporadic cases of meeting (matching) competitors' prices when a prohibited delivered pricing method is used. Moreover, the Commission's record in the *Standard Oil of Indiana* case demonstrates its lack of sympathy with the meeting-competition defense.[59] The difficulty of determining how frequently one can meet a competitor's price without risking prosecution under the order will prevent Section 2 (b) from granting much practical relief from f. o. b. mill pricing under the instant order.

Grave Doubts of Court of Appeals

The Court of Appeals expressed grave doubts as to the third ordering paragraph, stating, "If this paragraph * * * were to be given the effect of depriving each of the petitioners of every lawful and practical method of independently and honestly selling its products at delivered prices, and thus preventing it from engaging in nationwide competition, we would consider the paragraph invalid."[60] The Court of Appeals also stated, "It is possible that the Commission has made its order too broad in undertaking to proscribe the qualified independent use by each of the petitioners of the only practical systems of delivered pricing for its chain products. If in the *National Lead Co.* case the Commission had prohibited not only the individual use of

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[57] *Ibid.*, at p. 431.

[58] Appendix, *infra*, pp. 55-59.

[59] *Matter of Standard Oil Co.*, 41 F. T. C. Dec. 263, mod. 43 F. T. C. Dec. 56, *aff'd. Standard Oil Company (of Indiana) v. Federal Trade Commission* (CCA-7, 1949), 173 F. 2d 210, *rev'd* 340 U. S. 231 (1951); reconsidered on remand 49 F. T. C. Dec. 923, *rev'd*, (CCA-7, 1956), 233 F. 2d 649, *cert. granted* 352 U. S. 950 (1956).

[60] 246 F. 2d 231, at p. 237; Appendix, *infra*, pp. 38-39.

the single delivered price system there involved, but had also conditionally prohibited the use of all other practical delivered price systems, the Supreme Court might have refused to sustain so broad a prohibition." [61]

The Court of Appeals, however, quoted the Commission's supplemental brief in the instant case as suggesting that f. o. b. factory pricing is not the only alternative under the third ordering paragraph. According to that brief, the paragraph can be complied with by "competition in base prices." [62] By "competition in base prices" the Commission evidently means that each petitioner should have a different f. o. b. factory price. So far so good, but regardless of his base price level, when a petitioner's price plus the freight to a particular customer exceeds the price plus freight of a competing seller, the petitioner must alter his price and/or absorb enough of the freight cost so that his combination of base price plus freight will equal his competitor's base price plus freight. Absent the instant order, the petitioner has no choice but to *exactly match* the competitor's price, for any attempt to go below it will deprive him of the meeting-competition defense and thereby cause him to violate the Robinson-Patman Act, while failing to go as low as the competitor will lose him the sale. The third ordering paragraph, however, leaves him on the horns of a three-pronged dilemma. He must either: (i) lose the sale, (ii) violate the Robinson-Patman Act, or (iii) by meeting (matching) the competitor's delivered price, risk violating the instant order, for if such meeting (matching) is done more than occasionally or sporadically the Commission will treat it as the use of a "freight equalization * * * system * * * for the purpose [and] with the effect of systematically matching the * * * delivered prices of other sellers * * *"

The Court of Appeals stated that "The question of the evidentiary basis for the third ordering paragraph as

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[61] 246 F. 2d 231, at p. 238; Appendix, *infra*, pp. 39-40.

[62] 246 F. 2d 231, at p. 239; Appendix, *infra*, p. 42.

applied to all types of chains and to every petitioner, whether it had used all of the three delivered price systems or not, is, to say the least, debatable."[63] The Commission in its supplemental brief in the Court of Appeals had sought to justify this indiscriminate prohibition of all three delivered pricing methods (even though not used by all petitioners or on all types of chain) by stating that it would guard "against the use of the simple device of interchanging the systems used as among the three types of chain, and thus perpetuating the restraints of trade at which the order is directed."[64] Obviously, if such an interchange was by agreement it would violate the conspiracy part of the order. However, if it was the result of competition the Commission should have no more ground for objecting to or preventing it than if f. o. b. factory pricing or any other business practice had resulted from competition. *But the third ordering paragraph does not differentiate between acts of conspiracy and acts of competition.* One wonders what the Commission would have ordered if petitioners had been selling on a straight f. o. b. factory basis.

Commission's Failure to Consider Economic Effects of Order or Possible Alternative Remedies

In the instant case (unlike the *Lead* case where the Commission wrote an opinion stating its reasons for prohibiting the independent use of the zone system), the Commission wrote no opinion and, in its findings, said nothing to indicate that it had given any consideration whatsoever to the appropriateness or effects of the third ordering paragraph. The Commission studiously avoided any reference in its findings to the voluminous and uncontradicted evidence that the three delivered pricing methods in the instant case had (unlike the zone system in *Lead*) *not* been created by agreement but had been normal, non-collusive developments in the industry long prior to any alleged price-fixing conspiracy. The findings are, in fact, *wholly silent as to the*

[63] 246 F. 2d 231, at p. 238; Appendix, *infra*, p. 41.
[64] 246 F. 2d 231, at pp. 237-238; Appendix, *infra*, p. 39.

third ordering paragraph and for all that appears, it was inserted simply because a similar paragraph had been included in the *Lead* order issued thirty-five days earlier. The Commission clearly gave no consideration to the economic effects of the order, nor to the possible use of other less drastic remedies to accomplish its unannounced objective.

In *Federal Trade Commission* v. *Royal Milling Company*,[65] this Court held that the Commission could not prohibit all further use of a valuable trade mark, even though misleading, where the evil could be overcome by requiring the mark to be accompanied by appropriate explanatory language. In *Jacob Siegel Co.* v. *Federal Trade Commission* [66] a similar situation was presented, and this Court held that the Commission should have considered other alternative and less drastic remedies before imposing one that destroyed a valuable property right. Since the Commission's decision in *Siegel* (as in the instant case) did not show whether or not it had considered alternative remedies or, if so, why it had rejected them as unsuitable, this Court remanded the case to the Commission, saying:

> "* * * the courts are not ready to pass on the question whether the limits of [administrative] discretion have been exceeded in the choice of the remedy until the administrative determination is first made." [67]

Significantly, the Commission has never apparently considered any remedy necessary, except the mere prohibition of conspiracy, in the many price-fixing cases involving delivered pricing systems in which it has issued orders subsequent to its decisions in the *Lead* case and this

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[65] 288 U. S. 212 (1933).
[66] 327 U. S. 608 (1946).
[67] *Ibid.* at p. 614.

case.[68] An industry honestly desiring to compete is not hurt by an order forbidding conspiracies, but it cannot live under an order like the third ordering paragraph.

We respectfully submit that in affirming the Commission's third ordering paragraph, the Court of Appeals has misconstrued and unduly expanded the scope of this Court's decision in the *Lead* case and ignored this Court's decisions in the *Siegel* and *Royal Milling* cases. The question whether the authority granted the Commission by the *Lead* decision can be carried to the extreme of destroying, for all practical purposes, petitioners' rights to use delivered pricing to meet distant competitors' prices is an important question which has not been, but should be, settled by this Court.

The opinion of the Court of Appeals is a readily apparent *invitation* to this Court to consider the questions posed by the strong factual distinctions between this case and the *Lead* case and to consider the scope of its opinion in the *Lead* case.

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[68] *Matter of Sayles Finishing Plants, Inc.*, 49 F. T. C. Dec. 1427 (1953); *Matter of Blotting Paper Ass'n.*, Dkt. No. 6107, consent order to cease and desist (released Oct. 22, 1953); *Matter of U. S. Steel Corp.*, Dkt. No. 6078, consent order to cease and desist (released May 13, 1955); *Matter of Barnes Metal Products Co.*, Dkt. No. 6225, consent order to cease and desist (released Feb. 21, 1955); *Matter of Cordage Institute*, Dkt. No. 5848, consent order to cease and desist (released May 23, 1956). And see *Matter of Metal Lath Mfrs. Ass'n.*, Dkt. No. 5449, order dismissing complaint, Feb. 16, 1954, in which the complaint was dismissed (because the license agreements embodying the alleged conspiracy had been terminated five years before the complaint was issued) despite the fact that a zone system *created* by the licenses was still in use in the industry. If, in the *Metal Lath* case, the Commission deemed it possible for a price-fixing conspiracy to be discontinued notwithstanding the continuation of a zone system which was part of the conspiracy and had not existed prior to the conspiracy, why did the Commission deem it necessary in the instant case to prohibit not only further conspiracy but all further use of delivered pricing methods that had pre-existed any conspiracy and been entirely non-collusive in their genesis and use? The Commission's decision in the instant case fails to answer this question.

II.

The second question is whether the denial by the Commission of any opportunity to be heard on the form, substance or effects of the third ordering paragraph was a denial of due process of law.

The third ordering paragraph was not requested by counsel for the Commission (as the corresponding paragraph was in the *Lead* case), nor was it included in the Trial Examiner's recommended order.[69] Neither was it mentioned or suggested during either of the two oral arguments before the Commission, nor for that matter at any stage of the proceedings until it appeared out of a clear sky in the Commission's order issued some two and one-half years after the second oral argument.

In the *Lead* case the petitioners claimed in this Court that they had been denied due process because they had had no opportunity to defend against their counterpart of the third ordering paragraph. This Court found, however, that they *had* had such an opportunity but had not availed themselves of it.[70] In the instant case, this cannot be said. Petitioners were diligent in seeking an opportunity to defend against the third ordering paragraph once it appeared. Their motion to the Commission for a rehearing for this purpose was, however, denied out of hand, not on its merits but solely on the collateral (and, we submit, erroneous) ground that the Commission's membership had changed since the order was issued.[71] Petitioners then moved the Court of Appeals to remand the case to the Commission with instructions to hear petitioners' objections to the paragraph, but that motion was also denied.

When the Commission denied petitioners' motion for a rehearing, one Commissioner strongly dissented, saying

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[69] R. 454-459.

[70] *Supra*, note 2 at pp. 427-428.

[71] R. 665-667.

that no opportunity had been afforded for argument for or against the third ordering paragraph and that "it appears to me imperative that the existing Commission should correct such defect in the proceedings."[72] He further questioned the Commission's inconsistency in the matter of due process, stating that for three years the Commission had had a practice of allowing both sides an opportunity to argue for or against any proposed change by the Commission in the Hearing Examiner's form of order, but that the parties in this case were not accorded that right.[73]

We respectfully submit that the denial by the Commission of any opportunity to be heard on the form, substance or effects of the third ordering paragraph, and the Commission's and Court of Appeals' denials of petitioners' specific requests for such a hearing before the Commission, constituted a denial of due process of law.

III.

The third question is whether "conscious parallelism" in the continued use of delivered pricing methods during a period of alleged price-fixing justifies an inference that such continued use was by agreement, where such methods were non-collusive in their genesis and use long prior to such alleged price-fixing.

The question of "conscious parallelism" as evidence of conspiracy has long plagued the courts and practitioners at the antitrust bar. The theory seems to have had its beginning in this Court's decision in *Interstate Circuit, Inc.* v. *United States*,[74] where the parallel action was initiated by a specific invitation issued by one of the partici-

[72] R. 679.
[73] R. 680-681.
[74] 306 U. S. 208 (1939).

pants. Subsequent lower court decisions appear to have eliminated the element of invitation.[75]

In *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*[76] this Court partially clarified the problem by holding that proof of conscious parallel action alone would not require a verdict of conspiracy in a civil jury case. And in *United States* v. *Twentieth Century-Fox Film Corp.*[77] the District Court for the Southern District of California said:

> "Conscious parallelism of action may be the basis of an inference of pre-existing agreement. However, where *positive* evidence is offered to show the origin of a policy and the business considerations which motivated its establishment, parallelism, conscious or unconscious, ceases to be the determinant. * * *" (Italics are the court's).[78]

In the instant case, petitioners introduced voluminous evidence of the non-collusive origins of the three delivered pricing methods and the business considerations which motivated their establishment. The Commission utterly ignored such evidence in its findings, although there was no contrary evidence. Unlike its *National Lead* case decision where it dwelt at length on evidence that the zone delivered pricing system had been *created* by agreement, the Commission's instant findings on the entire subject of delivered pricing were limited to: (i) descriptions of how each system worked,[79] (ii) a finding as to the Chain Institute's freight rate book used only in conjunction with Pittsburgh Plus,[80] and (iii) a finding that each

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[75] *Milgram* v. *Loew's, Inc.* (CCA-3, 1951), 192 F. 2d 579, 584; *Ball* v. *Paramount Pictures, Inc.* (CCA-3, 1948), 169 F. 2d 317, 319-321; *William Goldman Theatres* v. *Loew's, Inc.* (CCA-3, 1945), 150 F. 2d 738, 745.

[76] 346 U. S. 537 (1954).

[77] 137 F. Supp. 78 (S. D. Cal. 1955).

[78] *Ibid.* at p. 85.

[79] *Supra*, note 23.

[80] *Supra*, note 24.

chain manufacturer in using the delivered pricing methods knew that each of his competitors was also using them.[81] Petitioners had stipulated the existence of this common knowledge,[82] since no intelligent chain manufacturer could have failed to know of the existence of industry customs of more than 25 years' standing.

Based upon its finding of "conscious parallelism" the Commission drew the inference that there must "*necessarily*" have been an agreement to continue to use the delivered pricing methods during the period of the alleged price-fixing conspiracy, or else the conspiracy would not have worked.[83] This, we submit, was a *non sequitur*. It was no more "necessary" that there be an agreement to continue the particular delivered pricing methods than that there be an agreement to continue selling welded chain by the pound, weldless chain by the foot and tire chains by the pair or to continue any other normal trade custom. A change in one of the delivered pricing methods or in any other custom might have necessitated some modification of the alleged price-fixing agreement, but it would hardly have terminated it. As the Commission found, several of the petitioners did make changes in their methods of delivered price selling,[84] but the Commission did not find that this brought the alleged price-fixing conspiracy to an end or diminished its effectiveness.

The question is whether "conscious parallelism" will support an inference of agreement to continue the use of pre-existing trade customs during the period of an alleged price-fixing conspiracy, where there is positive evidence of the non-collusive origins of the customs and the business considerations which motivated their establishment. This is an important question of Federal law which has not been, but should be, settled by this Court.

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[81] *Supra*, note 25.
[82] R. 702.
[83] *Supra*, note 26.
[84] *Supra*, note 16.

Conclusion

In closing, we summarize for the Court's convenience the important factual distinctions between the *Lead* case and this case, as hereinbefore brought out:

Lead Case	*This Case*
1. Zone system had no existence prior to price-fixing conspiracy.	Delivered pricing methods had long non-collusive histories prior to any price-fixing.
2. Zone system *created* by agreement as part of price-fixing conspiracy.	Delivered pricing methods entirely non-collusive in origin, having sound business reasons for their genesis and development.
3. Zone system "bizarre", "highly artificial", incapable of existence without conspiracy.	Delivered pricing methods normal; and existed for many years in absence of any price-fixing.
4. Order prohibits individual use only of one delivered-pricing system—zone system.	Order prohibits all known practical delivered pricing methods available to small manufacturers, leaving only expensive f. o. b. truck, warehouse or factory pricing.
5. Order does not prevent meeting of distant competitors' prices.	Practical effect of order is to prevent meeting of distant competitors' prices, except un-"systematically", whatever that means.
6. Order does *not* prohibit sole method of pricing acceptable to customers.	In prohibiting Universal Delivered Price Method, order prohibits petitioners from using only method on which their jobber-customers will buy; but powerful and diversified competitors not subject to order may still use that method.
7. Order does not prevent members of industry from selling in geographical areas of greatest demand.	Order prevents tire chains from being sold in areas of heaviest snowfall except by factory located there.

8.	Commission gave full consideration to questioned paragraph of order and showed by its decision that it had done so.	Commission's decision was entirely silent as to third ordering paragraph or reasons for including it in order.
9.	*Lead* petitioners had opportunity to be heard on paragraph.	Petitioners had *no* opportunity to be heard on paragraph.

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Petitions to Review Order of Federal Trade Commission

No. 14,821

CHAIN INSTITUTE, INC., AMERICAN CHAIN & CABLE COMPANY, INC., THE McKAY COMPANY, HODELL CHAIN COMPANY, ST. PIERRE CHAIN CORPORATION, S. G. TAYLOR CHAIN COMPANY, COLUMBUS McKINNON CHAIN CORPORATION, CAMPBELL CHAIN COMPANY, NIXDORFF-KREIN MANUFACTURING COMPANY, PEERLESS CHAIN COMPANY, THE JOHN M. RUSSELL MANUFACTURING COMPANY, INC., TURNER & SEYMOUR MANUFACTURING COMPANY, WESTERN CHAIN PRODUCTS COMPANY, DENNIS A. MERRIMAN, WILLIAM D. KIRKPATRICK, and GEORGE J. CAMPBELL, JR.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

[July 3, 1957.]

SUMNER S. KITTELLE (CANN, LAMB, LONG & KITTELLE; FRAZER F. HILDER, STEPHEN H. BEACH, WILKIE OWEN, FARR, GALLAGHER & WALTON; BEEKMAN & BOGUE; REED, SMITH, & McCLAY; McAFEE, GROSSMAN, TAPLIN, HANNING, NEWCOMER & HAZLETT; SIDLEY, AUSTIN, BURGESS & SMITH; MARSH, DAY & CALHOUN; LAWRENCE, GOLDBERG, LAWRENCE & LEWIN; FINCK & HUBER; HALFPENNY & HAHN; FREDERICK B. GERBER, and CHARLES FAY were with him on the briefs), for Petitioners.

J. B. TRULY, Attorney, Federal Trade Commission (EARL W. KINTNER, General Counsel, and ROBERT B. DAWKINS, Assistant General Counsel, Federal Trade Commission, were with him on the briefs), for Respondent.

Before: SANBORN, JOHNSEN and VOGEL, *Circuit Judges.*

SANBORN, *Circuit Judge.*

This case comes to this Court upon petitions to review a cease and desist order of the Federal Trade Commission [1] which is based upon its determination that the petitioners had conspired to bring about uniformity in prices for chain and chain products, in violation of Section 5 of the Federal Trade Commission Act.[2]

The petitioners are: the principal manufacturers of chain and chain products in the United States; the trade association of which they are members; and certain of the officers of the association. The Commission on December 22, 1942, issued a complaint charging them with having conspired to fix and maintain identical delivered prices for such products. Delivered prices are those charged by a seller for his goods when and where delivered. On October 9, 1945, the Commission issued an amended complaint which contained two counts. The first count charged the petitioners with conspiring, in violation of § 5 of the Federal Trade Commission Act, to fix identical delivered prices for their respective products by the use of the same delivered pricing methods, which are referred to as (1) a basing point system, (2) a freight equalization system, and (3) a zone system; and thereby preventing the forces of competition from making and determining price quotations.

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[1] The proceeding before the Commission is entitled, *In the Matter of Chain Institute, Inc., et al.*, Docket No. 4878. 49 F. T. C. 1041.

[2] 38 Stat. 719, as amended, 52 Stat. 111; 15 U. S. C. § 45.

The second count of the amended complaint charged the petitioners with price discrimination, in violation of § 2(a) of the Clayton Act, as amended.[3] That count was ultimately dismissed by the Commission. The petitioners denied all of the material allegations of the amended complaint. Evidence was heard by a Trial Examiner designated by the Commission. The hearings commenced in April of 1946 and continued through 1947 and into 1948. The record evidence was closed July 7, 1948. The Trial Examiner filed his recommended decision on September 23, 1948. It was later amended in some particulars. The case was argued before the Commission, on exceptions to the Trial Examiner's report, on April 7, 1949; was reargued September 22, 1950; and was finally decided by the Commission adversely to petitioners on the first count February 16, 1953, by a vote of 3 to 1, Commissioner Mason dissenting and Commissioner Carretta not participating. The cease and desist order under review was entered on the same date. In addition to the dismissal of the second count, the amended complaint was also dismissed as to several individuals who had been joined as parties. The record evidence necessarily reflects conditions in the chain industry as they existed prior to July 1948.

The petitioners on April 20, 1953, filed their "Joint and Several Petition to Review" the order of the Commission. The John M. Russell Manufacturing Company, Inc., and Turner & Seymour Manufacturing Company, who were parties to the joint petition, filed a supplemental petition to review the order, asserting, in effect, that there was no adequate evidentiary basis for a finding that they had participated in a conspiracy to fix prices. They asked that the relief prayed for in the joint petition be granted. The petitioners originally all sought a complete review and reversal of the Commission's findings and order. On June 17, 1954, they (with the exception of the two petitioners who had filed the supplemental petition and the Columbus

[3] 38 Stat. 730, 49 Stat. 1526; 15 U. S. C. § 13.

McKinnon Chain Corporation) moved this Court for leave to withdraw their challenge to the Commission's findings and order with respect to the price fixing conspiracy charge, except as such findings and order bore upon the use of the delivered pricing methods.

The cease and desist order of the Commission prohibited broadly a continuation of the price fixing conspiracy which the Commission had found to exist. Included in this part of the order was a subparagraph numbered (6) requiring the petitioners who make or deal in chain to cease and desist from entering into or continuing any common course of action, agreement or conspiracy to

> "Quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with the single basing point delivered-price system, the freight equalization delivered-price system, or the zone delivered-price system; or quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for chain or chain products at points of quotation or sale or to particular purchasers by any two or more sellers of chain or chain products using such plan or system or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller."

In addition, the Commission included in the order a third ordering paragraph. That paragraph required each of the corporate petitioners to

> "cease and desist from quoting or selling chain or chain products at prices calculated or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system, for the purpose or with the effect of systematically matching the delivered-price quotations

or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

The validity of both of these paragraphs of the order is challenged as being without adequate evidentiary support and exceeding the powers of the Commission.

The case was argued and submitted to this Court at its March Session 1956. The Court of Appeals for the Seventh Circuit had just decided the case of *National Lead Co.* v. *Federal Trade Commission*, 227 F. 2d 825, which also involved an alleged conspiracy to fix prices. The Commission in its cease and desist order in that case had included a paragraph similar to the third ordering paragraph in this case, forbidding the respondents there involved "from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price sytem for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." 227 F. 2d, at page 840. The Seventh Circuit ruled that that paragraph of the order was invalid. See pages 840-844 of 227 F. 2d. In his argument, in the instant case, counsel for the Commission conceded that if that ruling was correct, the corresponding paragraph in the order under review here could not be sustained. Moreover, Commissioner Mason, who had dissented in both the *National Lead Co.* case and this case, had said in his dissenting opinion, with respect to the order now under review: "The order in this case, like the order in Docket 5253, *National Lead Company, et al.*, goes further than to suppress practices found to be unlawful." We therefore deferred decision pending final disposition of the *National Lead Co.* case, in which the Supreme Court granted certiorari. That Court on Feb-

ruary 25, 1957, in *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, ruled that it was within the power of the Commission, under the evidence in that case, to include the paragraph corresponding to the third ordering paragraph in the instant case.

After the decision of the *National Lead Co.* case by the Supreme Court, the parties here, at our invitation, filed supplemental briefs relative to the effect, if any, of that decision upon the questions which we are called upon to decide, and specifying what those questions are.

The petitioners in their supplemental brief say that the Supreme Court merely decided in the *National Lead Co.* case that the Commission had basic statutory authority to include in its order a paragraph of the type there in question, forbidding the use of a single delivered pricing system, and that, as narrowly interpreted, the paragraph in that case was not an inappropriate remedy under the peculiar facts.

In our opinion, there are three questions requiring determination: (1) The validity of the prohibition contained in subparagraph (6) of the first ordering paragraph, prohibiting the continued use, pursuant to conspiracy, of the three delivered pricing systems. (2) The validity of the third ordering paragraph, prohibiting the individual independent use of any of the three delivered pricing systems "for the purpose or with the effect of systematically matching" delivered prices of competitors, with the effect of eliminating competition. (3) Whether there was an adequate evidentiary basis for the finding of the Commission that Columbus McKinnon Chain Corporation was a participant in the alleged conspiracy to fix prices.

The petitioners in their supplemental brief say that Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company, Inc., as well as Columbus McKinnon Chain Corporation, have challenged the entire findings, conclusions and order. The latter company has filed a brief. Neither of the other two has

briefed or argued its assertions of error. As was said in *Kimball Laundry Co.* v. *United States*, 8 Cir., 166 F. 2d 856, 859, "An unargued assertion of error is no more helpful to an appellate court than is an unsupported allegation of fact to a trial court. The burden of demonstrating error is upon an appellant, and errors assigned, but not argued in his brief, are waived." See, also, *Turner County, S.D.* v. *Miller*, 8 Cir., 170 F. 2d 820, 828.

Since the petitioners do not challenge the adequacy of the evidence to sustain the Commission's determination of the existence of concerted action by the petitioners, amounting to conspiracy, to fix the prices for chain and chain products, it is unnecessary to attempt to state the evidence in detail. What the petitioners contend is that there was no evidence that the delivered pricing methods used in the sale of the chain or chain products resulted from any conspiracy, understanding, agreement or concerted action on the part of the petitioners.

There is no doubt of the power of the Commission to declare that conduct which tends to restrain trade by fixing prices is an unfair method of competition. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 693. Within broad limits, it is for the Commission to prescribe the remedy for the prevention of such conduct, which may include depriving those who have engaged in it of the weapons which they used in making it effective. *Federal Trade Commission* v. *National Lead Co.*, *supra*, pages 428-430 of 352 U. S. See, also, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473.

The instant case strongly resembles the *Cement Institute* case, 7 Cir., 157 F. 2d 533, reversed in 333 U. S. 683; the *National Lead Co.* case, 227 F. 2d 825, reversed in part 352 U. S. 419; and the case of *Triangle Conduit & Cable Co., Inc.* v. *Federal Trade Commission*, 7 Cir., 168 F. 2d 175, affirmed by an equally divided Supreme Court under the title, *Clayton Mark & Co.* v. *Federal Trade Commission*, 336 U. S. 956. The only important distinction between the instant case and those cases, it seems to us, is

that here three delivered pricing systems are involved, and in each of the other cases only one was involved.

The record shows that the three delivered pricing systems or methods were used in selling chain. Welded chain (heavy-duty chain such as anchor chain, logging chain and the like) was sold under the old "Pittsburgh plus" method of delivered pricing, which called for the f. o. b. mill or factory price plus freight based on Pittsburgh. The method is described in the *Cement Institute* case at pages 697-698 of 333 U. S.

Weldless chain (which is lighter than welded chain and is made by bending and knotting wire into links or by cutting links from flat metal) was sold under the freight equalization method of computing delivered pricing. Under this system the buyer pays the seller's mill or factory price plus an amount equal to the rail freight applicable to the shipment from the factory, in which such chain is made, nearest freightwise to the point of delivery.

Tire chain (which consists of two welded line or side chains with cross links and is used on the wheels of motor vehicles to prevent skidding on or in snow, ice or mud) was sold f. o. b. factory with freight allowed or absorbed by the seller to all destinations in the United States. This the Commission calls a zone delivered price system, the entire United States being the zone. The petitioners prefer to call the system "the universal delivered price method." All that this means is that tire chains, like chewing gum, cigarettes, and many other products, are sold everywhere at the same delivered prices, regardless of point of origin.

The Commission, in substance, found that the petitioners entered into agreements and understandings concerning current and future prices; that they cooperatively compiled schedules of common pricing factors used in selling welded chain; that they adopted and used, by agreement, the prices and discounts published by the American Chain & Cable Company, Inc., the largest manufacturer of chain in the United States; that they exchanged information as

to prices at which their products were offered for sale generally and as to prices made particular customers; and that they promoted adherence to prices agreed upon through the Chain Institute and otherwise.

The Commission further found that

> "Each of the * * * manufacturers has quoted and sold chain and chain products at prices calculated pursuant to and in accordance with the particular method or system of computing delivered prices applicable to the products it sold, with the knowledge that all the other * * * manufacturers selling the same products were simultaneously doing likewise. In entering into and engaging in the cooperative and collective actions described hereinabove, there was necessarily an understanding and agreement between all of the respondents [before the Commission] that each of the * * * manufacturers would continue to use the particular method or system applicable to the type or types of chain each sold."

The Commission also found:

> "* * * All users of each of the three methods or systems of computing delivered prices have thus been enabled to present to a prospective purchaser a condition of matched prices in which such purchaser was isolated and deprived of any choice on the basis of price. The delivered costs to purchasers have not reflected any of the differences in cost of raw materials, other items, or freight delivery from the places of manufacture to the purchaser's delivery points. The principles and forces of competition have been prevented from making and determining the prices of each of the * * * manufacturers."

One not learned in unfair trade practices and unfair methods of competition might, from the record in this

case, get the impression that the Commission's findings presented a somewhat overdrawn and unduly sinister picture of the situation out of which this controversy arose. We think, however, that there was a sufficient evidentiary basis for an inference by the Commission that the substantial uniformity and virtual identity of prices which existed in the chain industry resulted from concerted conscious action on the part of petitioners, amounting to conspiracy, and that the delivered pricing methods used by petitioners in connection with and in furtherance of their cooperative and collusive efforts to fix or stabilize prices for chain were necessarily an inherent and indispensable part of the conspiracy.

In the *Cement Institute* case it was asserted, as it is here, that the Commission failed to find, and that the evidence failed to show, any agreement to use the delivered price system involved in that case. See page 709 of 333 U. S. This contention was rejected by the Supreme Court.

The contention of petitioners that subparagraph (6) of the first ordering paragraph is invalid and unjustified by the evidence, cannot be sustained. The Supreme Court held in the *Cement Institute* case that a similar paragraph was valid. The Court said (page 729 of 333 U. S.): "The paragraph is merely designed to forbid respondents from acting in harmony to bring about national uniformity in whatever fashion they may seek by collective action to achieve that result."

It is evident that it is the third ordering paragraph by which the petitioners are most aggrieved and which they seem to construe as totally and permanently disabling each of them from selling its chain products at delivered prices, and leaving them no alternative but to sell at prices f. o. b. their respective factories. They say this will prevent them from engaging in country-wide competition and confine each of them to its own local trade territory. If this paragraph of the order of the Commission were to be

given the effect of depriving each of the petitioners of every lawful and practical method of independently and honestly selling its products at delivered prices, and thus preventing it from engaging in nationwide competition, we would consider the paragraph invalid.

The only distinction between the third ordering paragraph in this case and the corresponding paragraph in the *National Lead Co.* case is that there the order proscribed the use of the zone delivered price system, which was the only delivered price system in question in that case, while in this case the Commission was dealing with three delivered price systems, each of which was used in computing the price of a single type of chain. In its supplemental brief, the Commission says:

> "While the use of each system was limited in the past to a particular type of chain, each has been equally effective in restraining trade and eliminating competition. The order, we think, properly guarded against the use of the simple device of interchanging the systems used as among the three types of chain, and thus perpetuating the restraints of trade at which the order is directed. The Commission has frequently issued orders which have consistently been upheld by the Courts, prohibiting unfair methods and practices as to all products sold in cases where the methods and practices had been used in the past only in connection with the sale of one of the products."

It is possible that the Commission has made its order too broad in undertaking to proscribe the qualified independent use by each of the petitioners of the only practical systems of delivered pricing for its chain products. If in the *National Lead Co.* case the Commission had prohibited not only the individual use of the single delivered price system there involved, but had also conditionally prohibited the use of all other practical delivered price

systems, the Supreme Court might have refused to sustain so broad a prohibition.

In *Federal Trade Commission* v. *Ruberoid Co., supra,* page 473 of 343 U. S., the Supreme Court, in sustaining an order of the Commission, said:

> "* * * Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. Moreover, 'the Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices' disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n,* 327 U. S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' Id., at 613."

We gather from this and the other recent Supreme Court decisions to which reference has been made, that, unless an order of the Commission can be said to be purely arbitrary because without adequate evidentiary support or because clearly beyond the Commission's powers, it

may not be set aside. The question of the adequacy of the evidentiary basis for the third ordering paragraph as applied to all types of chains and to every petitioner, whether it had used all of the three delivered price systems or not, is, to say the least, debatable. But if the Commission honestly and justifiably believed that competition in the chain industry had been virtually destroyed by the conduct of petitioners and that the third ordering paragraph was necessary to restore competitive prices, we cannot say that the Commission's determination in that regard was purely arbitrary. The Commission, in cases such as this, is the trier of the facts, the appraiser of the credibility of witnesses, the weigher of evidence, the drawer of inferences, and, within broad limits, the prescriber of remedies for trade practices found by it to be unfair. Its determination as to the facts is as invulnerable to attack as is a jury verdict in a case triable by and properly submitted to a jury. It seems apparent that, unless a reviewing court can demonstrate that the Commission's order is legally or factually baseless, it may not be set aside.

The scope of the third ordering paragraph in the instant case is, of course, the same as was the scope of the corresponding paragraph in the *National Lead Co.* case, with respect to which the Supreme Court said, page 431 of 352 U. S.:

> "* * * It is our conclusion that the order was not intended to and does not prohibit or interfere with independent delivered zone pricing *per se*. Nor does it prohibit the practice of the absorption of actual freight as such in order to foster competition. Furthermore, as we have said there is read into the order the provision of § 2(b) of the Clayton Act as to the right of a seller in good faith to meet the lower price of a competitor. This is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions."

Moreover, the Commission does not place the same construction on the paragraph as do the petitioners. In its supplemental brief the Commission says:

> "The order here does not require f.o.b. mill selling. As the Supreme Court pointed out in *National Lead*, 'delivered zone pricing violates the order only when two conditions are present: (1) identical prices with competitors (2) resulting from zone delivered pricing' (1 L. ed. 2d at 443). So, here, the order will be violated only if there are identical prices resulting from single basing point, freight equalization or zone delivered pricing. As we pointed out in our main brief, the order does not prohibit *per se* the use of any delivered price-system and can be fully complied with by competition in base prices, no matter what system of delivered pricing is used. If there is competition in base prices there cannot possibly be any 'systematic matching' of delivered prices."

Furthermore, if conditions have changed and the third ordering paragraph is no longer needed to restore competition to the chain industry, it seems fair to assume that the Commission will, upon application, reopen the proceeding under Section 5(b) of the Federal Trade Commission Act as amended, and modify its order. See *American Chain & Cable Co., Inc.* v. *Federal Trade Commission*, 4 Cir., 142 F. 2d 909, 911-912.

Columbus McKinnon Chain Corporation in its brief asserts that an adequate evidentiary basis for the Commission's finding that the company was involved in the conspiracy is lacking. The company points to the fact that it made no weldless chain, although it at times purchased small amounts of such chain for resale as an accommodation to its customers; that such resales were usually priced f.o.b. its factory at Tonawanda, New York, and rarely, when shipped with other chain, f.o.b. Pittsburgh; that about 95% of the tire chain sold by the company was its

own patented "claw chain", the published price of which differed from the prices of tire chain of other petitioners; that, while in selling its patented tire chain it independently adopted the universal delivered price method, the use of that method did not result in "any regular identity of price with" the tire chain of other petitioners; that when the company entered the tire chain business it adopted the pricing practices of established manufacturers; and that the only way to compete for tire chain sales was by the universal price method, "Because of the homogeneity of the product and the peculiarly sporadic geography of the tire chain market."

Columbus McKinnon asserts that the Commission's inference of its complicity is based on: (1) its membership in the Chain Institute, and (2) the similarity of its prices on welded chain to those of competing manufacturers. It contends that, considered in proper perspective, those facts do not justify the inference, and that mere membership in a trade association, without more, is not enough to establish participation in a conspiracy. It cites, in that connection, *Phelps Dodge Refining Corp.* v. *Federal Trade Commission*, 2 Cir., 139 F. 2d 393, 396. We note that in that case the court went on to say:

> "* * * Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put.

> While the culpable role of petitioner Cyanamid is less clearly established than that of the three petitioners already considered, it nevertheless sustains the Commission's findings."

The record shows that the Columbus McKinnon Chain Corporation was an active member of the Chain Institute from its inception, and followed the delivered pricing methods of other petitioners at least with respect to unpatented tire chain and welded chain.

The Commission, we think, reasonably could infer that Columbus McKinnon Chain Corporation, as a member of the Chain Institute, knew or was charged with knowledge of the collusive efforts of other members to stabilize prices for chain and chain products by suppressing competitive pricing, and was therefore a party to the conspiracy. Compare, *Federal Trade Commission* v. *Cement Institute*, supra, pages 717-720 of 333 U. S.

The order under review is affirmed, and an order of enforcement may be entered.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 14821—September Term, 1956

Friday, July 19, 1957.

CHAIN INSTITUTE, INC., et al.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Chain Institute, Inc., American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Columbus McKinnon Chain Corporation, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, The John M. Russell Manufacturing Company, Inc., Seattle Chain & Mfg. Company, Turner & Seymour Manufacturing Company, Western Chain Products Company and Woodhouse Chain Works, corporations, and Dennis A. Merriman, William D. Kirkpatrick and George J. Campbell, Jr., individuals, having on April 20, 1953, filed in this Court their joint petition to review an order to cease and desist issued on February 16, 1953, by the Federal Trade Commission in a proceeding before the said Commission entitled "In the Matter of Chain Institute, Inc., et al., Federal Trade Commission Docket No. 4878" (reported in 49 F. T. C. Dec. 1041); and The John M. Russell Manufacturing Company, Inc., and Turner & Seymour Manufacturing Company having on April 20, 1953, filed

in this Court their supplemental petition to review the said order to cease and desist; and petitioners, except The John M. Russell Manufacturing Company, Inc., Turner & Seymour Manufacturing Company and Columbus McKinnon Chain Corporation, having by motion filed June 17, 1954, withdrawn certain of the points relied upon in their said joint petition to review; and, pursuant to motion consented to by the respondent, the joint petition to review having on September 23, 1955, been dismissed by the Court as to the Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Mfg. Company and Woodhouse Chain Works; and the cause having been heard by this Court on briefs and oral argument; and the Court having on July 3, 1957, filed its opinion affirming the Commission's said order to cease and desist and directing the entry of an enforcement decree:

Now, Therefore, it is hereby ordered, adjudged and decreed that the said order to cease and desist be, and it hereby is, affirmed and enforced, and petitioners are commanded to obey the same and comply therewith.

It is further ordered, adjudged and decreed that petitioners shall, within ninety days after entry of this decree, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with the said order to cease and desist.

Without prejudice to the right of the Federal Trade Commission, respondent herein, to institute and maintain such proceedings for violation of its order to cease and desist and of this decree as may be warranted by law, this Court retains jurisdiction of this cause to enter such further orders or decrees herein from time to time as may become necessary.

July 19, 1957.

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Motion of Bridgeport Chain & Manufacturing Company, *et al.*

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Civil No. 14821

CHAIN INSTITUTE, INC., et al.,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

MOTION OF PETITIONERS THE BRIDGEPORT CHAIN & MANUFACTURING COMPANY, CLEVELAND CHAIN & MANUFACTURING COMPANY, ROUND CALIFORNIA CHAIN COMPANY, SEATTLE CHAIN & MFG. COMPANY, AND WOODHOUSE CHAIN WORKS TO DISMISS AS TO THEM THE PETITION FOR REVIEW FILED HEREIN ON APRIL 20, 1953

Now come The Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Mfg. Company, and Woodhouse Chain Works, petitioners herein, by their attorneys, and upon the annexed affidavit of Elden T. Davis, sworn to August 22, 1955, and upon the record herein as certified to this Court by the Federal Trade Commission on or about January 12, 1954, and upon all of

the proceedings had herein before this Court and before the Federal Trade Commission, and pursuant to Rules 18 and 4(d) of the Rules of this Court,

RESPECTFULLY MOVE this Court to dismiss as to them the Joint and Several Petition to Review Order of Federal Trade Commission which was filed and docketed in this Court in this proceeding on April 20, 1953, as modified by Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of The Prayer dated June 15, 1954 and filed and docketed in this Court on June 18, 1954, such dismissal to be without prejudice to or effect upon the remaining petitioners (other than these moving petitioners) which are parties to said petition.

AS GROUNDS FOR THIS MOTION, these moving petitioners respectfully show this Court and allege:

1. That, on July 23, 1954, they sold all of their machinery and equipment for the manufacture of chain and chain products, together with all of their inventories, trade marks and goodwill incident to their business in chain and chain products, to Republic Steel Corporation, a corporation not connected in any way with these moving petitioners.

2. That, since said date, these moving petitioners have not been engaged in the chain or chain products business and have no intention of engaging in that business in the foreseeable future.

3. Accordingly, the cease and desist order will have no effect on these moving petitioners and is moot as to them. Therefore, they are unwilling to spend the time and money necessary further to prosecute the said Joint and Several Petition to Review, as modified by Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of The Prayer dated June 15, 1954 and filed and

docketed in this Court on June 18, 1954, and are willing that the same be dismissed as to them.

Dated: September 14, 1955.

Respectfully submitted,

SUMNER S. KITTELLE,
Sumner S. Kittelle,
420 Lexington Avenue,
New York 17, New York.

FRAZER F. HILDER,
Frazer F. Hilder,
425 13th Street, N.W.,
Washington 4, D. C.

CANN, LAMB, LONG & KITTELLE,
New York, New York and
Washington, D. C.,

GANGER & GANGER,
Cleveland, Ohio,

STEPHEN H. BEACH,
New York, New York,
of Counsel.

The undersigned respondent, Federal Trade Commission, hereby consents to the entry of an order, upon the above motion, dismissing the Joint and Several Petition to Review Order of Federal Trade Commission as modified by Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of The Prayer dated June 15, 1954 and filed and docketed in this Court on June 18, 1954, as to petitioners The Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Manufacturing Company, and Woodhouse Chain Works.

Dated: September 14, 1955.

ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission,
Attorney for Respondent.

Affidavit of Elden T. Davis

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Civil No. 14821

CHAIN INSTITUTE, INC., et al.,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

STATE OF OHIO
COUNTY OF CUYAHOGA } ss.:

ELDEN T. DAVIS, being duly sworn, deposes and says that he is an officer, to wit, Vice President of The Bridgeport Chain & Manufacturing Company, Vice President of Cleveland Chain & Manufacturing Company, Vice President of Round California Chain Company, Vice President of Seattle Chain & Manufacturing Company and Vice President of Woodhouse Chain Works, and makes this affidavit in support of the annexed motion of said corporations, which are petitioners in the above-entitled cause, to dismiss as to them the Joint and Several Petition to Review Order of Federal Trade Commission which was filed and docketed in this Court on April 20, 1953;

That, on July 23, 1954, said corporations sold all of their machinery and equipment for the manufacture of chain and chain products, together with all of their inventories, trade marks and goodwill incident to their business in chain and chain products, to Republic Steel Corporation,

a corporation not connected in any way with any of said moving corporations.

That, since said date, said moving corporations have not been engaged in the chain or chain products business and have no intention of engaging in that business in the foreseeable future.

Accordingly, while said moving corporations agree with the other petitioners herein that the findings and cease and desist order of the Federal Trade Commission in this proceeding are not supported by evidence and are unlawful and should be set aside, said cease and desist order will have no effect upon said moving corporations and is moot as to them. Therefore, they are unwilling to spend the time and money necessary further to prosecute the said Joint and Several Petition to Review, and are willing that the same be dismissed as to them, such dismissal to be without prejudice to or effect upon the remaining petitioners (other than said moving corporations) which are parties to said Joint and Several Petition to Review.

WHEREFORE, affiant prays that said motion be granted.

/s/ ELDEN T. DAVIS.

Subscribed and sworn to before me
this 22nd day of August, 1955.

/s/ A. H. GANGER,
Notary Public.

A. H. GANGER, Notary Public
My commission expires Jan. 25th, 1956

Order Dismissing Petition for Review as to Bridgeport Chain & Manufacturing Company, *et al.*

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 14,821—September Term, 1955

CHAIN INSTITUTE, INC.; AMERICAN CHAIN & CABLE COMPANY, INC.; THE BRIDGEPORT CHAIN & MANUFACTURING COMPANY; THE McKAY COMPANY; HODELL CHAIN COMPANY; ST. PIERRE CHAIN CORPORATION; S. G. TAYLOR CHAIN COMPANY; CLEVELAND CHAIN & MANUFACTURING COMPANY; COLUMBUS McKINNON CHAIN CORPORATION; CAMPBELL CHAIN COMPANY; NIXDORFF-KREIN MANUFACTURING COMPANY; PEERLESS CHAIN COMPANY; ROUND CALIFORNIA CHAIN COMPANY; THE JOHN M. RUSSELL MAUNFACTURING COMPANY, INC.; SEATTLE CHAIN & MFG. COMPANY; TURNER & SEYMOUR MANUFACTURING COMPANY; WESTERN CHAIN PRODUCTS COMPANY; WOODHOUSE CHAIN WORKS; DENNIS A. MERRIMAN; WILLIAM D. KIRKPATRICK; and GEORGE J. CAMPBELL, JR.,

Petitioners,

VS.

FEDERAL TRADE COMMISSION.

JOINT AND SEVERAL PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION

There is before the Court motion of the petitioners The Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Mfg. Company, and Woodhouse Chain Works to dismiss as to them the joint and

several petition to review the order of the Federal Trade Commission which was filed and docketed in this Court in this proceeding on April 20, 1953, such dismissal to be without prejudice to or effect upon the remaining petitioners (other than these moving petitioners) which are parties to said petition. Entry of order of dismissal is consented to by counsel for respondent.

The prayer of the motion consented to is by the Court hereby granted and the joint and several petition in this matter to review the said order of the Federal Trade Commission is by the Court hereby dismissed as to the aforesaid moving petitioners.

September 23, 1955.

Commission's Supplemental Memorandum in Lead Case

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 63

FEDERAL TRADE COMMISSION,

Petitioner,

v.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, and THE EAGLE-PICHER SALES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION REGARDING SCOPE OF THE ORDER TO CEASE AND DESIST

(Filed Dec. 21, 1956)

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At the oral argument of this case, counsel for the Federal Trade Commission was requested to submit a further statement on behalf of the Commission setting forth its views as to the scope of a provision of the cease and desist order. In response to the Court's request, the Commission submits the following views:

The order provision in question reads:

> It is further ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

The construction stated herein is derived from the terms of the provision itself and from the Commission's opinion (R. 3803-3820). For the Court's convenience the portion of this opinion dealing directly with this order provision is reproduced in an appendix to this memorandum.

Broadly stated, the purpose of the order provision under consideration was effectively to deprive respondents, for a temporary period, of the continued use of the zone delivered pricing method which the Commission found had been the key instrumentality used by respondents in the successful operation of their price conspiracy. The period of time during which the order would remain in effect, though not specifically fixed, was intended to be

sufficient to break the existing pattern of pricing and bring about the establishment of a method or methods of pricing independently arrived at through the forces of competition.

Pursuant to this purpose the order provision is directed solely to zone delivered pricing. It should be made completely clear that if respondents choose to adopt and use any of the several other methods of pricing which are in common use by others, this order provision would have no application whatsoever, for it is strictly limited to zone delivered pricing. No other form of pricing could possibly violate its terms.

The result sought might have been accomplished by simply prohibiting, for a limited and specified period of time, any use by respondents of zone delivered pricing methods in the sale of lead pigments. An alternative method, and the one used in this case, would be to prohibit for a limited period of time any respondent from matching prices with other sellers through the use of a zone delivered pricing system.

The characteristics of zone delivered pricing should be kept in mind. For the purposes of the order a "zone delivered price system" is a method of pricing based upon designated geographic areas (zones). A seller's prices within a single zone are the same throughout that zone. Customarily the prices are different in different zones and always different as between contiguous zones. Thus the only way that prices can be matched by the use of zone delivered pricing is for the zones established by different sellers to be in whole or in part identical and for the zone prices of different sellers to be identical in the zones which coincide or overlap.

The difference between an absolute prohibition of the use of zone delivered pricing methods for a specified time, and the order issued, is that latter is to some extent more flexible. In part this is due to the fact that this provision is intended to be operative only so long as necessary to

insure a restoration of price competition. In its opinion the Commission stated:

> "• • • If after competition is restored any of the respondents can make a proper showing to the Commission that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law. (R. 3817) (*1)

Some flexibility as to possible continued use of zone delivered pricing results from the fact that the Commission did not, by indulging a presumption that no respondents would or could sell some products comparable with those of others at different prices, forbid zone pricing as such. It may be possible that by reason of product differences, varying consumer acceptance, or other considerations, some comparable products can and will be sold at different prices. If this should be the case, respondents could continue to use zone delivered pricing in selling such products.

Before there can be a violation of this order provision by any respondent, two things must coincide. There must be "matched" prices, which means prices identical with those of other sellers, and these must result from the use by such respondent of a zone delivered pricing plan or system.

Any matching of prices on competing lead pigments resulting from the use by a respondent of a zone delivered price system would be matching prices in accordance with such plan or system and would violate the terms of the order provisions. On the other hand if a respondent con-

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(*1) American Chain & Cable Co., Inc. et al. v. Federal Trade Commission, 142 F. 2d 909, 911-912. Cf. International Union of Mine, Mill & Smelter Workers, Locals 15, 17, 107, 108 and 111 (C. I. O.) et al. v. Eagle-Picher Mining & Smelting Co., et al., 325 U. S. 335, 342.

tinues to sell an industry product pursuant to a zone delivered pricing method but at prices which differ in zones which in whole or in part coincide in area with zones used by other sellers, this would not violate the terms of this order provision, even though the price differences were slight. In such a situation, if in some instances a seller departed from his zone delivered price with the result of matching the price of a competitor, this would not violate the terms of the order provision because the matching would not be according to the plan or system of zone delivered pricing.

This order provision will, for such period of time as it may be in effect, prevent any continuation of price matching by respondents through the use of zone delivered pricing. It seems entirely probable that respondents would use a different pricing method rather than risk violation of the order through the use of zone delivered pricing. Whether a different pricing method or zone pricing with different prices is used, it would be a method originating from competition instead of agreement.

Respectfully submitted,

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